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***National Glass, Inc. v.
J.C. Penney Properties,
Inc.:***

***WAIVER OF
RIGHT TO
PURSUE
MECHANIC'S LIEN
HELD INVALID
AS AGAINST
PUBLIC POLICY.***

In *National Glass, Inc. v. J.C. Penney Properties, Inc.*, 336 Md. 606, 650 A.2d 246 (1994), the Court of Appeals of Maryland voided a contractual choice-of-laws provision holding that its application was contrary to public policy. The court established that forum selection clauses must bear a substantial relationship to the transaction and must not contravene the strong policy interests of the state which would have controlled the dispute. Following the court's holding in *National Glass*, foreign entities may now be subjected to harsh Maryland remedies regardless of their specific contractual safeguards. Such a result could ultimately increase the cost of doing business in Maryland and will accordingly have long-term economic implications.

John R. Hess, Inc. ("Hess"), a corporation organized under the laws of Pennsylvania, was hired as the general contractor for the construction of a new J.C. Penney ("Penney") store to be located in Charles County, Maryland. Hess hired National Glass, Inc. ("NGI") as a subcontractor on the project. As part of the subcontract agreement, NGI agreed to be bound by the laws of Pennsylvania and to waive any future rights to liens that might arise as a result of the material and labor to be furnished. NGI completed the work as agreed and sought payment from Hess. When payment was not forthcoming, NGI petitioned the Circuit Court for

Charles County seeking to establish a mechanic's lien on Penney's Maryland property.

Upon Penney's motion, the trial court agreed that the dispute should be controlled by Pennsylvania law. Since mechanic's lien waiver provisions were permissible in Pennsylvania, NGI's petition was dismissed with leave to amend. NGI moved for reconsideration of the trial court's dismissal, but the motion was denied. NGI then appealed to the court of special appeals and, prior to consideration, the court of appeals granted certiorari. However, the court of appeals later determined that the trial court's dismissal with leave to amend was not a final, appealable order, and the appeal was promptly dismissed. Thereafter, the trial court entered a final order dismissing NGI's claim with prejudice. NGI appealed from that order and the court of appeals again granted certiorari.

The Court of Appeals of Maryland began its analysis by noting that parties are generally free to agree which jurisdiction's laws will control their transaction. *National Glass*, 336 Md. at 610, 650 A.2d at 248 (applying Restatement (Second) of Conflict of Laws §187(2) (Supp. 1989)). The court did note two instances where such a forum selection would not be upheld. *Id.* If the chosen state has "no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties [sic] choice," the selection may

properly be set aside. *Id.* In addition, the chosen state's laws will not be applied if they conflict with important policies of the otherwise controlling state which has a "materially greater interest" in the contested issue. *Id.* at 611, 650 A.2d at 248.

After assuming that the contract in the instant case was sufficiently related to Pennsylvania, the court then focused on the policy implications of applying Pennsylvania law to the agreement's provisions. *Id.* at 611, 650 A.2d at 249. The court initially noted that mere differences between Pennsylvania and Maryland law would not automatically serve as a violation of public policy requiring non-enforcement of the contested waiver. *Id.* at 612, 650 A.2d at 249. In the present situation however, more than mere differences existed. *Id.* In Pennsylvania, mechanic's lien waiver provisions were clearly permissible. *Id.* at 609, 650 A.2d at 248. However, the Maryland mechanic's lien statute, Real Property Code Md. Code, section 9-113, deemed such attempted waivers void. *Id.* at 614, 650 A.2d at 250. Moreover, section 9-113 had been amended in 1994 to provide that such waivers were not only void, but also void as against public policy. *Id.* The court reasoned that such recent, explicit legislative action was indicative of Maryland's strong policy regarding the prohibition against lien waivers. *Id.* at 615, 650 A.2d at 250.

The court then proceed-

ed to examine the magnitude of Maryland's interest in resolving the issue. *Id.* Since the real property in question was located in Maryland, the court noted that Maryland law would have been applicable absent the contract waiver. *Id.* at 612, 650 A.2d at 249. In addition, NGI was a Maryland corporation providing subcontracting services for a Maryland project. *Id.* at 615, 650 A.2d at 251. Pennsylvania's only connection to the dispute resided in Hess, a corporation which was not even a party in the current proceeding. *Id.* Contrasting the two states' respective interests, the court concluded that Maryland's interest in resolving the dispute was materially greater than Pennsylvania's. *Id.* at 616, 650 A.2d at 251. Based on Maryland's strong policy interests, the court of appeals held that the trial court's dismissal of NGI's complaint was erroneous, and the case was remanded with instructions to conduct further consistent proceedings. *Id.* at 617, 650 A.2d at 251.

In *National Glass, Inc. v. J.C. Penney Properties, Inc.*, the Court of Appeals of Maryland set forth two requirements that contractual choice-of-law

provisions must meet. The selection must bear a substantial relationship to the parties, the transaction, or otherwise be reasonable. Additionally, the application of the chosen state's laws must not breach a strong public policy of the state which would have controlled the arrangement. Such a limitation on the vitality of forum selection clauses severely undermines the ability of foreign corporations to limit their exposure to unexpected litigation.

The *National Glass* holding might serve as a springboard from which the court could leap into other private arenas in the name of furthering Maryland's policy interests. The reverberations from the court's opinion will undoubtedly force out-of-state corporations to re-evaluate their interest in future Maryland ventures. The fear of having a contract reformed may be transformed into an increased business expense that would inevitably be passed along to Maryland residents. Such a protectionist posture on first blush may seem desirable, but could have detrimental long-term effects on the state's competitiveness.

- Christopher R. Rahl

